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Nos. 82-1326 and 82-1327

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

JAMES G. WATT, SECRETARY OF THE INTERIOR, et al., Petitioners (in No. 82-1326)

and

WESTERN OIL AND GAS ASSOCIATION, et al., Petitioners (in No. 82-1327)

v.

STATE OF CALIFORNIA, et al., Respondents (in both Nos. 82-1326 and 82-1327)

BRIEF OF AMICUS CURIAE STATE OF ALASKA

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TABLE OF AUTHORITIES

CASES:

Alaska v. Andrus, 580 Fed.2d 465 (D.C. Circuit),, vacated in part as moot, sub. nom. Western Oil and Gas Association v. Alaska, 439 U.S. 922 (1978). 8

STATUTES:

Coastal Zone Management Act, P.L. 89-454, 16 U.S.C. § 1451 et seq., as amended. 1

Section 307(c)(1), 16. U.S.C. § 1456(c)(1) 5

MISCELLANEOUS:

Brochure, "The Coastline of the United States," published by the National Ocean Survey, National Oceanic and Atmospheric Administration, U.S. Department of Commerce 2

MISCELLANEOUS: (continued)

Fact Sheet on OCS Leasing Schedule, July 22, 1982, issued by the United States Department of the Interior, Alaska Outer Continental Shelf Region, Office of Public Affairs. 2

Federal 5-Year Oil and Gas Leasing Schedule, published at 46 Fed. Reg. 11983 (March 19, 1982). . . . 3

State of Alaska, Department of Community and Regional Affairs, map of Organized Borough and Cities, January 1983 4

INTEREST OF AMICUS CURIAE

Amicus curiae State of Alaska submits this brief in support of respondents State of California, et al. Alaska participated as an amicus in the proceedings below. Under Rule 36.4 of the Rules of the Supreme Court, the parties' written consent to the filing of an amicus curiae brief by the State of Alaska is not required.

The State of Alaska is one of the sovereign States of the United States of America. Alaska has adopted a coastal management program, approved by the federal government, as authorized by the Coastal Zone Management Act ("CZMA"), P.L. 89-454, 16 U.S.C. § 1451 et seq., as amended. Because of facts unique to Alaska, this Court's decision in this action may have greater significance for Alaska than any other coastal State.

Part of this significance is

due to Alaska's size and the tremendous length of Alaska's coastline. Alaska's coastline totals 6,640 miles, more than half of the 12,383 miles of United States coastline. By comparison, the Pacific coastline of the 48 contiguous States totals 1,293 miles, the Gulf of Mexico coastline totals 1,631 miles, and the Atlantic coastline totals 2,069 miles. 1/

Because of these facts, more federal outer continental shelf ("OCS") leasing will occur off Alaska's coast than off any other State. Of the 936 million total acres in all federal OCS planning areas, 557 million (or approximately 60%) are offshore Alaska. 2/

1/ See brochure "The Coastline of the United States," published by the National Ocean Survey, National Oceanic and Atmospheric Administration, U.S. Department of Commerce.

2/ See Fact Sheet on OCS Leasing

Since the federal OCS leasing program commenced in 1954, 10 of the 60 federal OCS sales have been offshore Alaska, all since 1976. 3/ Of the 32 federal OCS sales scheduled between now and 1987, 13 will be offshore Alaska. 4/

More Alaskans are employed by

Schedule, July 22, 1982, issued by the United States Department of the Interior, Alaska Outer Continental Shelf Region, Office of Public Affairs (reprinted as Exhibit A to this brief).

3/ The 10 sales were: (1) Northern Gulf of Alaska (Sale 39), April 1976; (2) Lower Cook Inlet (Sale CI), October 1977; (3) joint federal/State Beaufort Sea sale (Sale BF), December 1979; (4) Eastern Gulf of Alaska (Sale 55), October 1980; (5) Eastern Gulf of Alaska reoffering sale (RS-1), June 1981; (6) Lower Cook Inlet/Shelikof Strait (Sale 60), September 1981; (7) Lower Cook Inlet reoffering sale (RS-2), August 1982; (8) Diapir Field (Sale 71), October 1982; (9) Norton Sound (Sale 57), March 1983; and (10) Saint George Basin (Sale 70), April 1983.

4/ See Federal 5-Year Oil and Gas Leasing Schedule, published at 46 Fed. Reg. 11983 (March 19, 1982).

the commercial fishing industry than any other industry in the State. In addition, tourism and subsistence fishing are extremely important. Because of the relative lack of road systems in Alaska, most Alaska communities have built up along the coast.

At the same time, Alaska has little or no local coastal infrastructure to accommodate and mitigate the effects of offshore development. Substantially less than one-third of Alaska's coast is within an organized local government unit, and almost all of that is concentrated in two areas, the North Slope and the Cook Inlet/Kodiak area. 5/

As a result, Alaska's federally

5/ See State of Alaska, Department of Community and Regional Affairs, map of Organized Boroughs and Cities, January 1983.

approved coastal management program is virtually the only legal mechanism available to the State and to many local areas of Alaska's coast for influencing and mitigating both offshore and onshore impacts of federal OCS leasing activity. Alaska accordingly has a very direct interest in the outcome of this case, an interest as great or greater than any other coastal State.

SUMMARY OF ARGUMENT

Contrary to petitioners' assertions, Alaska's experience with federal OCS leasing demonstrates that CZMA consistency review at the lease sale stage not only facilitates but is essential to furthering the national interest in full development of OCS energy resources consistent with federally approved State coastal management programs.

ARGUMENT

The question presented in this

action is whether federal OCS lease sales must be "consistent with approved state management programs" under Section 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1). 6/ On the substantive merits of that issue, the State of Alaska adopts and supports the position and analysis of respondents State of California, et al. and amicus curiae Coastal States Organization.

However, petitioners James G. Watt, Secretary of the Interior, et al.

6/ An ancillary question is presented in the cross-petition filed by cross-petitioners State of California, et al., in No. 82-1511: whether the Ninth Circuit erred in addressing the meaning of the phrase "to the maximum extent practicable" as used in § 307(c)(1) of the CZMA, 16 U.S.C. § 1456(c)(1). Alaska joins the cross-petitioners and amicus curiae Coastal States Organization in urging this Court to hold that the gratuitous Ninth Circuit discussion of that phrase was premature and judicial construction of that phrase, if required, should await a proper case.

("federal petitioners"), and petitioners Western Oil and Gas Association, et al. ("WOGA"), assert that "if CZMA consistency review is imposed on the issuance of an OCS lease, the national interest in full development of energy resources on the outer continental shelf may be thwarted" 7/ and that "[a]pplication of the CZMA to OCS leasing in the manner envisioned below would erect substantial litigation impediments to the development of OCS energy resources, thus contravening the basic purpose of the 1978 OCSLA [Outer Continental Shelf Lands Act] amendments to permit the swift, orderly and efficient exploitation of the oil and gas resources of the OCS." 8/

Alaska's recent experience with

7/ Federal petitioners' Brief, p. 19.

8/ WOGA Brief, p. 17.

federal OCS leasing belies these assertions and demonstrates that they are unfounded. Indeed, the opposite is true: CZMA consistency review at the lease sale stage can materially advance the national interest, as expressed in both the OCSLA and the CZMA, in full development of OCS energy resources in a manner consistent with federally approved State coastal management programs.

As noted above 9/, there have been 10 federal OCS lease sales offshore Alaska since 1976. The State of Alaska brought suit with respect to only the first of those sales, the 1976 Northern Gulf of Alaska sale. See Alaska v. Andrus, 580 Fed.2d 465 (D.C. Circuit), vacated in part as moot, sub. nom. Western Oil and Gas Association v. Alaska,

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9/ See n. 3 supra.

439 U.S. 922 (1978).

Following that less than completely successful litigation experience, and because of the time, expense, and uncertainty of litigation, Alaska successfully has sought and reached agreement with the federal government regarding individual federal OCS lease sales with respect to both tract deletions and protective stipulations to minimize adverse environmental impacts. 10/ In

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10/ For example, in addition to tract deletions, the following stipulations have been included in one or more federal OCS lease sales offshore Alaska: (1) seasonal drilling restrictions precluding drilling during periods when the bowhead whale, an endangered species, migrates through sale areas; (2) a requirement that a drilling structure withstand two seasons of ice movement before drilling can be commenced; (3) protection for areas of historical and archaeological significance by requiring a survey and inventory of significant sites before activity commences; and (4) a requirement that the oil industry conduct educational programs for oil company workers

addition, under separate agreements with the Department of the Interior, Alaska's concurrence must be obtained before certain activities proposed by federal OCS lessees may begin. 11/

On the basis of these tract deletions, protective stipulations and separate agreements, the State of Alaska found the affected federal lease sales consistent with Alaska's federally

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regarding environmental concerns and community values, customs and lifestyles in rural coastal regions of Alaska.

11/ For example, the State has obtained concurrence authority with respect to: (1) oil spill contingency plans; (2) exploratory drilling and downhole activities during broken ice conditions (the most dangerous operating conditions in Alaska); (3) the discharge of waste waters as well as mud and cuttings into marine waters less than 10 meters deep; and (4) proposals to load oil onto tankers directly from production platforms instead of piping it ashore for loading from an onshore terminal facility.

approved coastal management program. As a result, the State of Alaska was not compelled to sue to enjoin the sales. The sales proceeded, as contemplated under the OCSLA, in a manner consistent with Alaska's coastal management program, as contemplated under the CZMA.

The point is that CZMA consistency review at the lease sale stage actually has facilitated federal OCS leasing in Alaska by ensuring that the leases issued were consistent with Alaska's federally approved coastal management program. The experience in Alaska demonstrates that such a review can occur without frustrating the national interest, as expressed in the OCSLA, in development of OCS energy resources.

More importantly, it demonstrates that the national interest in development of OCS energy resources can be advanced in a manner which is fully

compatible with the national interest, as expressed in the CZMA, "to preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation's coastal zone for this and succeeding generations." 12/

Indeed, CZMA consistency review must be available at the lease sale stage since it is the lease -- i.e., the contractual agreement between the federal government and the oil company lessees -- which forms the basis for all of the companies' subsequent OCS activities. Particularly with respect to protective stipulations, such review at the lease sale stage reduces the likelihood of litigation at the subsequent exploration and development stages. Where such protective stipulations are included as

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12/ 16 U.S.C. § 1452(in part).

contractual terms in the lease, they become express factors to be weighed in the bidding decisions by prospective lessees. If not included in the lease but subsequently imposed as a result of CZMA consistency review of exploration or development plans, disagreement whether there has been a material modification of the contractual terms of the lease, or indeed a complete taking, is almost inevitable.

In summary, from a policy perspective, efficient and orderly development of OCS energy resources consistent with federally approved State coastal management programs can be accomplished only if both national interests -- OCS energy resource development and protection of the coastal zone -- are given full consideration at every stage of the process. Since the contractual OCS lease establishes the fundamental basis for all subsequent activities, CZMA consistency

must be applied at the lease sale stage if the national interest in OCS energy resource development is not to be thwarted by irreconcilable differences between the terms of the lease and the requirements of federally approved State coastal management programs.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit Court of Appeals holding that the consistency review provisions of § 307(c)(1) of the CZMA apply to federal OCS lease sales should be affirmed.

DATED: August 11, 1983.

Respectfully submitted.

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FACT SHEET ON OCS LEASING SCHEDULE

Background: The 5 year leasing program announced today will replace the program covering the period from mid-1980 through mid-1985 which was approved in June 1980. A draft proposed program was announced April 16, 1981. A proposed program was announced July 15, 1981, and it was expected at that time that a final program could be adopted in early 1982. However, on October 6, 1981, the U.S. Court of Appeals for the District of Columbia Circuit issued a decision on litigation involving the 5-year program adopted in June 1980. The court remanded the June 1980 program and its administrative record for revision in accordance with the OCS Lands Act. The tentative proposed final program was announced March 15, 1982, in accord with the court's October 6, 1981 order and a subsequent January 19, 1982 clarification order. The proposed final program was submitted May 11, 1982, to the President and the Congress for a 60-day notification period, which has now been completed.

Highlights of the Final Program: The OCS Lands Act requires that the program the secretary selects must "...consist of a schedule of proposed lease sales indicating as precisely as possible, the size, timing and location of leasing activity...." Highlights of the Secretary's decisions on each of these prime elements are:

Size: The size of the sales included in the proposed program issued in July 1981 was based on area-wide lease offerings. On December 15, 1981, the Secretary made a preliminary decision to refine that concept which he reaffirmed in his decision on the final leasing program. Under the refined concept, the department will consider entire planning areas for lease. In preparing for OCS offerings, the Minerals Management Service (MMS) will focus analysis on those portions of a planning area which MMS, the oil and gas industry and others believe have the potential for discovery of oil and gas. MMS will provide an environmental description of the entire planning area.

Acreage: The acreage in each planning area included in the program is: North Atlantic, 82 million; South Atlantic, 99 million; Western Gulf of Mexico, 35 million; Central Gulf of Mexico, 46 million; Eastern Gulf of Mexico, 38 million; Southern California, 22 million; Central and Northern California, 37 million; North Aleutian Basin, 32 million; St. George Basin, 70 million; Navarin Basin, 37 million; Norton Basin, 25 million; Barrow Arch, 30 million; Diapir Field, 49 million; Gulf of Alaska, 133 million; Kodiak, 89 million; Cook Inlet, 8 million; and Shumagin, 84 million. Total for all planning areas -- about one billion acres.

Sale Offerings: 41 sales are proposed from August 1982 through June 1987. By area they are: Gulf of Mexico, 12; Alaska, 16; California, 4; Atlantic, 8; and Reoffering (4 areas), 1 sale.

By year: 1982, 5 sales; 1983, 7 sales; 1984, 8 sales; 1985, 9 sales; 1986, 8 sales; 1987, 4 sales.

Resources: Estimated total remaining hydrocarbon resources in the OCS: 43.5 billion barrels of oil; 230.6 trillion cubic feet of gas. The Alaska OCS contains over half the total OCS acreage and much of the estimated remaining oil and gas resources.

Changes: From the proposed final to the final program three changes were made: Sale RS-2 was moved from July to August 1982; Sale 52 (North Atlantic) was moved from late August to October 1982, to allow further state consultation; Sale 76 (Mid-Atlantic) was moved from March to April 1983, because of a delay in the public hearing on the draft environmental impact statement.

Exhibit A